IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1027 of 2003
WITH
CRIMINAL MISC. APPLICATION No 6969 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ZAKIRHUSSAIN MUNIRUDDIN SHAIKH

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 1027 of 2003
MR MM TIRMIZI for Appellant No.
MR PR ABICHANDANI, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 05/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. At the time of admission hearing of the appeal as well as considering the application under section 389 of the Code of Criminal Procedure [Cr.P.C.], it appeared to us that even prima-facie the finding given by the trial Court with regard to the appellant having committed offence under section 302 of the Indian Penal Code [for short 'IPC'] is erroneous. Hence, we have summoned the record and proceedings from the trial Court by our order dated 8/9/2004. Mr. MM Tirmizi, learned advocate appearing for the appellant has also supplied to the Court as well as to the otherside copies of the relevant evidence for ready reference. With the consent of Mr. MM Tirmizi, learned advocate for the appellant and Mr. PR Abichandani, Ld. APP for the State, we have taken up this matter for final hearing today.

2. According to the prosecution, the incident took place on 9th March, 2001 at about 10.00 p.m. When the complainant was watching television on the second floor of his house, at about 12.00 mid night somebody called him from the front yard of his house and that person informed the complainant that his brother Rasidkhan had a quarrel with Zakir and Pappu. He, therefore, went running near Karamsad road. At that very time his nephew Mujfarkhan Sayedkhan came there. When they arrived at the spot, the complainant noticed that Zakir i.e. present appellant had given one blow with knife on the back of Rasidkhan. His nephew also witnessed this incident. Both of them raised shouts. The appellant and original accused Pappu, who was with him at that time, ran away towards the village pond. Rasidkhan had fallen down on the ground. The complainant and his nephew immediately rushed to the injured and the complainant asked Rasidkhan why he was assaulted. Rasidkhan informed the complainant that daughter of one Iliyaskhan of Anand had eloped and it was suspected that she had gone away with Imrankhan Matbarkhan of Bakrol. The injured was informed about it by one Abdulbhai Mangalsha Divan of Bakrol and he had told Rasidkhan that the present appellant and Imran being friends, the appellant might be knowing about the girl. The appellant was, therefore, requested to find out the girl. On 8th February, 2001 Zakir had gone in search of the girl and at about 12.00 mid-night, when Rasidkhan learnt that Zakir and Pappu had come to the house of Zakir, he also went there and inquired from Zakir about the girl. However, Zakir gave a kick to Rasidkhan and thereafter he

started running away with original accused Pappu. According to Rasidkhan he also followed Zakir to catch him but when they reached Karamsad road, Zakir gave a blow with knife on his back.

2.1. The complainant immediately sent his nephew to fetch a vehicle. In the meanwhile, Abdulbhai Mangalsha Divan arrived there on a motorbike and injured was taken on motorbike to Karamsad Shri Krushna Hospital. However, he was declared dead at the hospital.

2.2. The complainant thereafter went to Vidhyanagar Police Station and lodged the FIR. The offence was registered at C.R. No. I - 39/2001 and usual investigation commenced. At the end of the investigation, it was found that the present appellant, one Nalinbhai alias Pappu Kantibhai Khristi and Mohmed Iqbal Abdulgani Vora were involved in the incident. They were charge-sheeted in the Court of the Ld. Judicial Magistrate First Class at Anand for offences under section 302 read with section 34 of the IPC and section 135 of the Bombay Police Act. The Ld. Magistrate in turn committed the case to the Court of Ld. Sessions Judge, Anand, since offence under section 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial, three separate Sessions Cases were numbered being Sessions Case No. 177/2001 which was in respect of Nalinbhai alias Pappu Kantibhai Khristi, Sessions Case No. 228/2001 was in respect of the present appellant, whereas Sessions Case No. 191/2002 was in respect of Mohmed Iqbal Abdulgani Vora. At the time of recording of the evidence, all the three cases were consolidated and evidence was recorded in Sessions Case No. 177/2001.

3.1. At the trial, the Ld. Sessions Judge framed charge against the appellant and original accused for offence under section 302 read with section 34 of the IPC and section 135 of the BP Act on 18/1/2003. The same was, however, denied by the accused and they claimed to be tried.

3.2. At the trial, the prosecution, to establish its case against the appellant and other accused, led oral as well as documentary evidence. In all 19 witnesses were examined and documentary evidence in the form of FIR, various panchnamas, post mortem report, etc. was produced. On completion of the recording of the evidence further statement of the accused under section 313 of the Code of Criminal

Procedure was recorded. No specific defence was taken and their defence was that of general denial.

3.3. The Ld. Sessions Judge, at the end of the proceedings by judgment dated 15th July, 2003, convicted the appellant for offence under section 302 of the IPC and sentenced him to suffer imprisonment for life and to pay fine of Rs.4,000/=, in default further RI for four months. He was also convicted for the offence under section 135 of the BP Act and sentenced to suffer RI for one year and to pay fine of Rs.1,000/=, in default further RI for one month. Original accused Mohmed Iqbal and Navinbhai alias Pappu were acquitted of the offences with which they were charged.

3.4. It is this judgment and order of conviction and sentence, which are challenged before this Court by the appellant in this appeal.

4. We have heard Mr. MM Tirmizi and Mr. PR Abichandani. Mr. Tirmizi has almost conceded that so far involvement of the appellant in the present incident and authorship of the injury caused to the deceased are concerned, there is no dispute. He has, however, challenged the conviction recorded under section 302 of the IPC. According to him, considering the facts and circumstances of the case, the offence would fall under section 304 Part-II of the IPC.

4.1. As against that, Mr. Abichandani has supported the conclusion drawn by the trial Court and has submitted that considering the medical evidence the appellant can safely be held guilty of committing offence under section 302 of the IPC.

5. We have carefully gone through the evidence on record of the case as well as the judgment and also we have considered the rival submissions. It appears that deceased Rasidkhan lost his life in the incident which took place on 9th March, 2001. It is the case of the prosecution that the appellant had given a blow on the back of Rasidkhan. To establish this fact, the prosecution has examined P.W. No. 8 - Safikhan Bismillakhan i.e. complainant at Exh. 38 and P.W. No. 11 - Muzfarkhan Shahidkhan Pathan at Exh. 44. Though Mr. Tirmizi has not seriously disputed the incident and the role played by the appellant, we have also perused carefully the evidence of these witnesses, who are the eye witnesses. On considering their evidence, we find that they are natural witnesses and they had seen the appellant delivering a blow on the back of the deceased.

It also appears from their evidence that when the assault was over, they had immediately rushed to the injured and he had told them why the appellant had caused him injury. The defence has not been able to elicit anything of importance from these witnesses. In view of that, we are in total agreement with the conclusion drawn by the trial Court that it was the appellant who had caused injury to the deceased.

6. The next question that arises for our consideration is whether the finding given by the trial Court that the appellant is liable for committing offence under section 302 of the IPC is proper and legal. For deciding this question, it is necessary to keep in view the fact that according to the prosecution when the deceased had gone to the house of appellant, there was some talk and thereafter the appellant gave him a kick and started running away alongwith original accused Pappu. The deceased chased them. When they reached Karamsad road, appellant gave a blow with knife on the back. If these facts are taken into consideration, it is obvious that the appellant did not entertain any intention to cause death or to inflict such injury on the deceased which may be sufficient in ordinary course of nature to cause death. It is easy to draw this inference because had the appellant entertained any intention to commit murder of Rasidkhan, he would have delivered blow on the chest somewhere on the heart region or in the stomach and would have delivered more than one blow. However, the situation is that inspite of the fact that he was having knife and the deceased was unarmed, he had inflicted only one blow and that too on the back. It, therefore, clearly appears that his intention was not to cause death or inflict such injury which would be sufficient in ordinary course of nature to cause death. Obviously, therefore, the act would not fall under section 300 and the offence would not be punishable under section 302 of the IPC.

6.1. When it is culpable homicide not amounting to murder, then it would be required to be seen whether it falls under section 304 and if yes, under which part. So far section 304 Part-I is concerned, there does not appear any intention on the part of the appellant to cause death or to cause injury which is likely to cause death. If that be so, the act would not stand covered under Part-I of that section. However, when the appellant is armed with dangerous weapon like knife and when he delivered a blow with force which had caused damage to the lungs, as can be seen from the medical evidence in the form of post mortem notes at Exh.

12 and the oral evidence of Dr. Mani Vinod Qurian, knowledge can well be attributed to him. It can be inferred that at the time of assault he knew that such injury may cause death of the person receiving it. When the appellant is saddled with the knowledge, his act would stand covered under Part-II of section 304 of the IPC.

7. For the aforesaid discussion, we hold that the conviction recorded by the trial Court under section 302 of the IPC is erroneous. It is required to be altered. Hence we hold the appellant is guilty of committing offence under section 304 Part-II of the IPC. Consequently, the order of sentence of life imprisonment is modified. The appellant is now sentenced to suffer RI for five years. Order regarding fine is maintained. Appellant's conviction for offence under section 135 of the BP Act, sentence for one year imposed for the same and fine are maintained. The sentences are ordered to run concurrently.

In the result, the appeal is partly allowed.

Muddamal articles to be disposed of in accordance with the direction given by the trial Court.

In view of the above, no order is required to be passed in Criminal Misc. Application No. 6969 of 2004. Hence it is disposed of accordingly.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

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